Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CF INDUSTRIES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To the U.S. Court of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) – which held that that the Harbor Maintenance Tax (HMT) is a tax and not a user fee – forecloses the court of appeals' decision that the HMT is a user fee and not a tax, and therefore not governed by the Uniformity Clause of Article I.

2. Whether the HMT statute violates the Uniformity Clause requirement that "all Duties, Imposts and Excises shall be uniform throughout the United States," by imposing a tax on certain types of port use in all of the coastal states except Alaska and Hawaii, where such port use is tax exempt.

3. Whether the HMT statute's tax exemption for port use in Alaska and Hawaii violates the Port Preference Clause of Article I, which forbids Congress from granting express preferences in revenue laws for all of the ports of any state.

RULE 29.6 DISCLOSURE

Petitioner CF Industries, Inc. has no parent corporation, and no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 DISCLOSURE ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Harbor Maintenance Tax 3

B. The Harbor Maintenance Tax on Cargo Loadings and the United States Shoe Case 3

C. This Litigation 4

1. The Ruling of the U.S. Court of International Trade 4

2. The Ruling of the U.S. Court of Appeals for the Federal Circuit 7

REASONS FOR GRANTING THE PETITION 8

I. THE COURT OF APPEALS' DECISION UNDER THE UNIFORMITY CLAUSE CONFLICTS WITH THE PREMISE OF THIS COURT'S DECISION IN *UNITED STATES SHOE* 8

A. The Court's Ruling in *United States Shoe* Controls This Case 9

TABLE OF CONTENTS continued

Page

B. *United States Shoe* is Not Distinguishable From This Case 11

1. The Court of Appeals' Effort to Distinguish *United States Shoe* Does Not Withstand Scrutiny 11

2. The Terms "Tax" and "Duty" Have the Same Meaning in Different Provisions of Article I 13

C. The Court Should Grant Review to Prevent the Court of Appeals' Decision From Creating a Broad and Disruptive Impact on Federal Taxation 18

1. The Federal Budget Process Would be Substantially Disrupted if Taxes Could be Characterized as User Fees 18

2. The Legislative Process Would be Disrupted if the Same Assessment Could be Characterized Both as a Tax and a User Fee 21

D. The Court's Review Should Address the Substantive Scope of the Uniformity Clause 23

II. THE COURT SHOULD GRANT THE PETITION TO ADDRESS THE QUESTION WHETHER THE PORT PREFERENCE CLAUSE REMAINS A MEANINGFUL LIMIT ON CONGRESSIONAL POWER 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Ala. Great S. Ry. Co. v. United States, 340 U.S. 216 (1951) 26

Armour Packing Co. v. United States, 209 U.S. 56 (1908) 26

Edye v. Robertson, 112 U.S. 580 (1884) 24

Fairbank v. United States, 181 U.S. 283 (1901) 15, 16

Fernandez v. Weiner, 326 U.S. 340 (1945) 13

Harmelin v. Michigan, 501 U.S. 957 (1991) 15

Hughes v. Oklahoma, 441 U.S. 322 (1979) 27

Knowlton v. Moore, 178 U.S. 41 (1900) 16, 24

La. Pub. Serv. Comm'n v. Tex. & New Orleans R.R., 284 U.S. 125 (1931) 26

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 13, 16

Nat'l Cable Television Ass'n v. United States, 415 U.S. 336 (1974) 22

Pace v. Burgess, 92 U.S. 372 (1875) 11

Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855) 26

Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) ..... *passim*

Thomson Consumer Elecs., Inc. v. United States, 247 F.3d 1210 (Fed. Cir. 2001) 4

Thomson multimedia Inc. v. United States, 219 F. Supp. 2d 1322 (Ct. Int'l Trade 2002) ..... *passim*

TABLE OF AUTHORITIES continued

Page

Twin City Nat'l Bank of New Brighton v. Nebecker, 167 U.S. 196 (1897) 22

United States v. IBM Corp. 517 U.S. 843 (1996) 15, 16, 17

United States v. Munoz-Flores, 495 U.S. 385 (1990) 22

United States v. Ptasynski, 462 U.S. 74 (1983) ..... *passim*

United States v. United States Shoe Corp., 523 U.S. 360 (1998) ..... *passim*

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 15

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 7, cl. 1 22

U.S. CONST. art. I, § 8, cl. 1 ..... *passim*

U.S. CONST. art. I, § 9, cl. 4 ..... 2, 13

U.S. CONST. art. I, § 9, cl. 5 ..... *passim*

U.S. CONST. art. I, § 9, cl. 6 ..... 2, 4, 26

STATUTES

26 U.S.C. § 4461(b) 3, 9, 10

26 U.S.C. § 4461(c)(2) 10

26 U.S.C. § 4461(c)(2)(A) 3

26 U.S.C. § 4461(c)(2)(B) 3

26 U.S.C. § 4462(a)(1) 3

26 U.S.C. § 4462(b) 2, 4, 5

26 U.S.C. § 4462(b)(1)(A) 5, 29

26 U.S.C. § 4462(b)(1)(C) 5, 29

26 U.S.C. § 4462(b)(1)(D) 5

28 U.S.C. § 1295(a)(5) 28

TABLE OF AUTHORITIES continued

Page

28 U.S.C. § 1581 ..... 4, 24, 28

28 U.S.C. § 1581(i) 4

MISCELLANEOUS

Congressional Budget Office, Congress of the United States, *The Growth of Federal User Charges* (1993) ..... *passim*

131 Cong. Rec. H9737 (daily ed. Nov. 6, 1985) 19, 23

D.L. Terry & Bill J. Kirby, *Commercial Fertilizers 2001* (Ass'n of Am. Plant Food Control Officials, Inc., Lexington, KY & Fertilizer Institute, Washington D.C.) June 2002 29

James Madison Notes (Aug. 16, 1787) in 3 *THE FOUNDERS' CONSTITUTION* (1987) 17

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TABLE OF AUTHORITIES continued

Page

U.S. Army Corps of Engineers, *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1999* (2001) 20

Worldwide NPK Capacity Listing by Plant FERTILIZER SITUATION REP. (Int'l Fertilizer Dev. Ctr., Muscle Shoals, Ala) Aug. 2000 29

PETITION FOR A WRIT OF CERTIORARI

This case calls on the Court to review the constitutionality of the provisions of the Harbor Maintenance Tax (HMT) that remain in effect following the Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). In *United States Shoe*, the Court held that the HMT imposed with respect to export cargo was a tax, and not a user fee, and therefore subject to the Export Clause prohibition that "[n]o Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. The provisions of the HMT statute that do not apply to exports, and therefore were not reviewed in *United States Shoe*, still assess approximately $500 million in HMT each year on cargo unloaded at the nation's coastal seaports, following shipment from other states and foreign countries.

In the U.S. Court of Appeals for the Federal Circuit, Petitioner CF Industries argued that the HMT on cargo unloadings violates the Uniformity Clause of Article I, by imposing a tax on certain types of port use in all of the coastal states except Alaska and Hawaii, where such port use is tax exempt. CF Industries maintained that the exemption for Alaska and Hawaii violates the longstanding Uniformity Clause requirement that a tax must "apply, at the same rate, in all portions of the United States where the subject of the tax is found." *United States v. Ptasynski*, 462 U.S. 74, 84 (1983). The court of appeals never reached the merits of CF Industries' argument, however, because it held that the Uniformity Clause does not apply to the HMT. Notwithstanding this Court's decision, in *United States Shoe*, that the HMT is a tax and not a user fee, the court of appeals held that the HMT is a user fee and not a tax for purposes of the Uniformity Clause, and therefore outside the scope of Uniformity Clause requirements. The court of appeals also rejected CF Industries' claim that the tax exemption for port use in Alaska and Hawaii violates the Port Preference Clause

of Article I, which forbids Congress from granting express preferences in revenue laws for the ports of any state.

CF Industries now respectfully petitions this Court to review the Federal Circuit's judgment, which because of that court's exclusive jurisdiction now stands as the law of the land with respect to these constitutional provisions as applied to the revenue laws administered by the U.S. Bureau of Customs and Border Protection.

OPINIONS BELOW

The opinion of the Federal Circuit (Pet. App. A2-20) is reported at 340 F.3d 1355. The opinion of the U.S. Court of International Trade (Pet. App. A21-23) is not reported.

JURISDICTION

The Federal Circuit's final judgment was entered on August 18, 2003. (Pet. App. A1.) On November 10, 2003, the Chief Justice granted an application for extension of time to file this petition on or before December 16, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Appendix (Pet. App. A26-35) sets forth verbatim the following statutory and constitutional provisions: 26 U.S.C. §§ 4461-4462; U.S. CONST. art. I, § 8, cl. 1; and U.S. CONST. art. I, § 9, cls. 4, 5 and 6.

STATEMENT OF THE CASE

This case presents the question whether the Harbor Maintenance Tax (HMT) imposed on unloadings of commercial cargo is unconstitutional. The HMT statute exempts certain types of unloadings from the tax if they occur in the ports of Alaska or Hawaii, but the same types of unloadings are taxed if they occur in the ports of any of the other coastal states. 26 U.S.C. § 4462(b). The issue here is

whether this exemption for Alaska and Hawaii violates the Uniformity Clause of Article I (which requires taxes to be geographically neutral) or the Port Preference Clause of Article I (which forbids taxes that give an express preference to the ports of one state over the ports of another state).

A. The Harbor Maintenance Tax

In 1986, Congress enacted the HMT to raise new revenues to fund the development and maintenance of the nation's harbors, which had traditionally been funded through general tax revenues. The HMT statute imposed the tax on "port use," defined as "the loading of commercial cargo on, or . . . the unloading of commercial cargo from, a commercial vessel at a port." 26 U.S.C. § 4462(a)(1). The HMT statute imposed the tax on loadings only if the pertinent cargo was "to be exported from the United States." *Id.* § 4461(c)(2)(A). The tax on unloadings was imposed on any cargo shipments unloaded at a coastal port, regardless of whether the shipments originated inside or outside of the United States. *Id.* § 4461(c)(2)(B). The amount of tax owing was a fixed percentage of the value of the cargo loaded or unloaded. *Id.* § 4461(b). The U.S. Customs Service (now Bureau of Customs and Border Protection) was charged with the responsibility to administer and enforce the HMT statute.

Petitioner CF Industries is a fertilizer manufacturer that pays HMT on the phosphate fertilizer that it unloads in Davant, Louisiana, following shipment from East Tampa, Florida. CF Industries has paid hundreds of thousands of dollars in HMT for unloadings of fertilizer at Davant during the period at issue in this case.

B. The Harbor Maintenance Tax on Cargo Loadings and the *United States Shoe* Case

Beginning in the mid-1990's, thousands of exporters filed separate civil actions in the United States Court of

International Trade (CIT), challenging the constitutionality of the loadings tax on export cargo under the Export Clause of the U.S. Constitution, which provides that "[n]o Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. The action filed by United States Shoe Corp. was selected as a test case to resolve the Export Clause issue. Following a decision by the CIT and an appeal to the U.S. Court of Appeals for the Federal Circuit, this Court held that the HMT on loadings was an unconstitutional export tax. *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). It is critical in the present case that this Court's *United States Shoe* ruling rested on the conclusion that the HMT is a "tax" subject to Export Clause prohibitions and not a "user fee." *Id.* at 369.

C. This Litigation

1. The Ruling of the U.S. Court of International Trade

Although the *United States Shoe* ruling invalidated the HMT on cargo loadings for export, the Customs Service continued to collect the unloadings tax. On April 10, 2002, CF Industries filed this action in the CIT, seeking a ruling that the tax on cargo unloadings violates the Uniformity Clause, U.S. CONST. art. I, § 8, cl. 1, and the Port Preference Clause, U.S. CONST. art. I, § 9, cl. 6. Because there were no material facts in dispute, the parties filed cross-motions seeking legal rulings on the constitutional issues presented.[1]

In its motion for summary judgment, CF Industries focused on the HMT statute's "special rule for Alaska, Hawaii, and possessions" that exempts substantial "port use" (*i.e.*, unloadings of cargo) in Alaska and Hawaii from the

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[1] Jurisdiction in the CIT arose under 28 U.S.C. § 1581(i). *See Thomson Consumer Elecs., Inc. v. United States*, 247 F.3d 1210 (Fed. Cir. 2001).

tax, but does not exempt the same types of "port use" in any other coastal state. 26 U.S.C. § 4462(b). CF Industries explained that under this tax exemption, unloadings of cargo from intrastate shipments in Alaska and Hawaii are not taxed, even though unloadings from intrastate shipments in all of the other coastal states are taxed. *Id.* § 4462(b)(1)(D). Under this portion of the exemption, for example, shipments from Juneau unloaded in Anchorage are not taxed, whereas shipments from San Francisco unloaded in Los Angeles are taxed. CF Industries also focused on the fact that the HMT statute exempts unloadings in Alaska and Hawaii from the tax if the cargo is shipped from any of the other 48 states. *Id.* § 4462(b)(1)(A), (C). By contrast, a shipment from any of those same 48 states is taxed if unloading occurs in a coastal state other than Alaska or Hawaii. *See id.* § 4462(b). Under this portion of the exemption, shipments from San Francisco unloaded in Juneau are not taxed, whereas shipments from San Francisco unloaded in Seattle are taxed.

CF Industries argued that the tax exemption for Alaskan and Hawaiian ports violates the longstanding Uniformity Clause requirement that a tax must "apply, at the same rate, in all portions of the United States where the subject of the tax is found." *Ptasynski,* 462 U.S. at 84. CF Industries maintained that the HMT is unconstitutional, because the subject of the tax is cargo unloadings, and the tax is not assessed on certain unloadings in Alaska and Hawaii but is assessed on the same types of unloadings in the other coastal states.

CF Industries also argued that the exemption for Alaskan and Hawaiian ports violates the Port Preference Clause, by establishing an express preference for the ports of Alaska and Hawaii over the ports of the other coastal states.

The government opposed CF Industries' summary judgment motion and moved to dismiss, asserting that the HMT did not violate the Uniformity Clause or Port

Preference Clause. The CIT ruled for the government. The CIT explained its ruling in a three-page Memorandum Opinion that relied almost completely upon its earlier decision in *Thomson multimedia, Inc. v. United States*, 219 F. Supp. 2d 1322 (Ct. Int'l Trade 2002), which was incorporated by reference. (Pet. App. A21-23.)[2]

In *Thomson*, the CIT had held that a tax violates the Uniformity Clause "only where [the Court] finds that Congress' purpose was to promote regional favoritism or discrimination" (219 F. Supp. 2d at 1326) and also suggested that a tax does not violate the Uniformity Clause unless Congress has acted in "bad faith" (*id.* at 1328), rather than for a "benign" purpose (*id.* at 1329). The CIT therefore decided that as long as Congress has a proper reason for taxing one geographic region differently than another, the Uniformity Clause does not require the HMT to apply uniformly in all geographic areas where its subject is found. The CIT concluded that the HMT complies with the Uniformity Clause because Congress enacted the Alaska and Hawaii exemption for a proper purpose – to relieve tax burdens in the two states that are most dependent upon ocean transportation for domestic consumption – rather than for the improper purpose of promoting regional favoritism. *Id.* at 1327.

The CIT below also denied relief under the Port Preference Clause by relying on its ruling in *Thomson*. (Pet. App. A22.) In *Thomson*, the CIT conceded that "[b]y exempting Alaska and Hawaii domestic cargo, Congress arguably granted an express preference to those two states." *Thomson*, 219 F. Supp. 2d at 1331. However, the CIT also held that a statute that simply results in a preference does not

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[2] We are informed that Thomson will petition for a writ of certiorari on issues substantially related to the present case.

violate the Port Preference Clause, and that the statute must "explicitly discriminate against the ports of a particular state" to be unconstitutional. *Id.* at 1330. The court then elaborated upon what it meant by "explicit discrimination," holding that a statute only violates the Port Preference Clause if Congress had the improper purpose of "intend[ing] to channel commerce toward all of the ports of a favored state." *Id.* at 1331. The CIT held that the HMT was constitutional because the purpose of the Alaska and Hawaii exemption was to relieve an undue tax burden on those states rather than to channel commerce to them improperly as "favored" states. *Id.* at 1331-32.

2. The Ruling of the U.S. Court of Appeals for the Federal Circuit

CF Industries appealed to the U.S. Court of Appeals for the Federal Circuit, which affirmed the judgment of the CIT. The court of appeals first ruled that the Uniformity Clause does not apply to the HMT, on the ground that the HMT is a "user fee" and not a "tax." (Pet. App. A8-15.) Although this Court had held, in *United States Shoe*, that the HMT is a "tax" and not a "user fee," the court of appeals attempted to distinguish *United States Shoe* because it involved the Export Clause instead of the Uniformity Clause. The court of appeals concluded that the Export Clause imposes a narrower definition of a "tax" than other constitutional provisions do, so that the HMT is properly characterized as a "tax" (and not a "user fee") under the Export Clause and as a "user fee" (and not a "tax") under the Uniformity Clause. (*Id.*) Having ruled that the Uniformity Clause does not apply to the HMT, the court of appeals did not address the substantive scope of the Uniformity Clause.

The court of appeals then ruled that the HMT does not violate the Port Preference Clause. The court rejected CF Industries' argument that the special tax exemption for port use in Alaska and Hawaii meets the test for an

unconstitutional port preference. The court of appeals concluded that the exemption does not violate the Port Preference Clause, because the special exemption for Alaska and Hawaii does not involve "deliberate discrimination against the ports in one or more states and in favor of others." (*Id.* at A15.) The court of appeals acknowledged that no previous court had applied that test but found support for it in the original purpose of the Port Preference Clause, which the Founders intended to counteract regionalism. (*Id.* at A15-16.) In the court of appeals' view, the HMT statute was constitutional, because the exemption for Alaska and Hawaii was not intended to favor those states and was instead enacted for the proper purpose of alleviating the HMT's impact in those states, arising from their great dependency upon ocean-going cargo. (*See id.* at A19.)

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION UNDER THE UNIFORMITY CLAUSE CONFLICTS WITH THE PREMISE OF THIS COURT'S DECISION IN *UNITED STATES SHOE*

The petition should be granted because the court of appeals' decision under the Uniformity Clause conflicts with the premise of this Court's decision in *United States Shoe*, 523 U.S. 360. In *United States Shoe*, the Court held that the HMT is a tax and not a user fee. *Id.* at 369. The court of appeals below reached the diametrically opposite conclusion, holding that the HMT is a user fee and not a tax. (Pet. App. A15.) The two rulings cannot be reconciled, as the court of appeals maintained, simply because *United States Shoe* addressed the Export Clause of Article I and this case addresses the Uniformity Clause of Article I. (*See id.* at A8-15.) This Court should grant the petition to resolve this conflict, which directly controls the entitlement to

approximately $1 billion in taxes assessed on cargo unloadings, as well as the disposition of more than 1,000 tax refund cases now pending in the CIT.

A. The Court's Ruling in *United States Shoe* Controls This Case

This case is controlled by the Court's ruling, in *United States Shoe,* that the HMT is a tax and not a user fee. That ruling turned on the relationship between the monetary assessment, on the one hand, and the government services that the assessment would fund, on the other. The Court held that if the relationship was a close one, the assessment would properly be viewed as a fee for particular government services (*i.e.*, a user fee). On the other hand, the Court held that if the relationship was remote, the assessment would properly be viewed as a tax. The Court ruled that the HMT was a tax, because there was no direct correlation between the amount of tax a particular exporter paid and the harbor maintenance services the exporter received. *United States Shoe*, 523 U.S. at 369.

In *United States Shoe*, the Court explained that the HMT is an *ad valorem* tax (assessed as a fixed percentage of .125% of the value of the cargo loaded for export), and that cargo value "does not correlate reliably with the federal harbor services used or usable by the exporter." *Id.* That is because the extent and manner of port use depend, not upon cargo value, but upon "factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires, for instance, harbor dredging." *Id.* The Court concluded that the HMT is a tax and not a user fee, because a user fee "must fairly match the exporters' use of port services and facilities." *Id.* at 370.

This ruling in *United States Shoe* controls this case, because both cases have an identical relationship between the monetary assessment and the government services provided. The HMT statute imposed exactly the same

assessment – a fixed percentage of .125% of cargo value – in this case as in *United States Shoe*, because the statute uses the same tax rate regardless of whether a cargo loading or unloading is involved. 26 U.S.C. § 4461(b). In addition, the government services at issue – harbor maintenance services – are the same in *United States Shoe* and in the present case. The only differences between the cases concern the times that the assessment occurred and the times that harbor maintenance services were provided. In *United States Shoe*, liability for the tax attached at the time cargo was loaded for export, whereas in the present case, liability for the tax attached at the time cargo was unloaded following a domestic shipment. *Id.* § 4461(c)(2). In addition, in *United States Shoe*, the harbor services were utilized before cargo was exported, whereas in the present case, the harbor services were utilized before and after domestic shipments were made. These trivial differences between this case and *United States Shoe* have absolutely no bearing on the question whether the HMT is a tax, which turns purely on the relationship between the assessment and the government service provided.

Because the assessment, the government service, and the relation between the two are the same in this case as in *United States Shoe*, this case is controlled by the Court's ruling that the HMT is a tax and not a user fee. The central question in this case, as in *United States Shoe*, is whether an *ad valorem* method of calculation has any correlation to port use, which is the subject of the tax. The answer to that question derives from the nature of the charge and the characteristics of port use, and is unrelated to the particular constitutional provision under challenge.

B. *United States Shoe* is Not Distinguishable From This Case

1. The Court of Appeals' Effort to Distinguish *United States Shoe* Does Not Withstand Scrutiny

The Court's ruling, in *United States Shoe*, that the HMT is a tax is not limited to the Export Clause context as the court of appeals held. (*See* Pet. App. A9-10.) This Court gave no indication that its *United States Shoe* ruling was so limited, and its reasoning easily extends to the Uniformity Clause, which addresses the federal taxing power in the same terminology as the Export Clause.

First, this Court did not, as the court of appeals suggested, rely upon a "stringent standard specific to the Export Clause" in determining whether the HMT is a tax. (*See id.*) While this Court emphasized that the Constitution places stricter *limitations* on export taxes than on other taxes, it did not hold that the *definition* of what *constitutes* a tax is somehow different under the Export Clause than under other constitutional provisions that use the same or similar language. Indeed, as explained *infra* in Section B.2, this Court's other decisions call for a consistent definition of "tax" in the various Article I provisions governing the taxing power.

Second, this Court did not limit its ruling to the Export Clause context, as the court of appeals held, simply because *United States Shoe* relied upon an Export Clause precedent (*Pace v. Burgess*, 92 U.S. 372 (1875)) and distinguished three precedents under other constitutional provisions, holding that they "[did] not govern" the case. *United States Shoe*, 523 U.S. at 368. (*See* Pet. App. A9-10.) This Court suggested that these other three precedents did not apply because they shed no light on the specific *textual* question before the Court – whether the HMT fit within the language of the Export Clause, as a prohibited "tax or duty" laid on

exports. U.S. CONST. art. I, § 9, cl. 5.

None of the three precedents that the Court distinguished analyzed the difference between user fees, on the one hand, and exactions that meet the constitutional terms "tax" or "duty," on the other. For example, one precedent addressed the difference between a prohibited state restriction on interstate commerce and a user fee (rather than the difference between an Article I "tax" or "duty" and a user fee). *See United States Shoe*, 523 U.S. at 367-68 (citing *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 717-21 (1972)). In distinguishing this precedent, the Court raised the difference between interpreting express and implied constitutional requirements, noting the stark contrast between the fluid "'nontextual negative command'" of the Commerce Clause and the more restrictive "'textual command'" of the Export Clause at issue in *United States Shoe*. *United States Shoe*, 523 U.S. at 368 (quoting *United States v. IBM Corp.*, 517 U.S. 843, 851 (1996)).

Another precedent distinguished in *United States Shoe* addressed the difference between a prohibited violation of state sovereign immunity and a user fee (rather than the difference between an Article I "tax" or "duty" and a user fee). *See United States Shoe*, 523 U.S. at 367-68 (citing *Massachusetts v. United States*, 435 U.S. 444, 463-67 (1978)). Although this case involved the states' immunity from federal taxation, no construction of the terms "tax" and "duty" was involved, because that immunity has no express textual basis and was "judicially implied from the States' role in the constitutional scheme." *Massachusetts*, 435 U.S. at 455.

The third precedent distinguished in *United States Shoe* addressed the difference between a Fifth Amendment Taking and a user fee, which also obviously did not raise the textual question before the Court. *United States Shoe*, 523 U.S. at 367-68 (citing *United States v. Sperry Corp.*, 493 U.S. 52, 62

(1989)).

The court of appeals' analysis does not undermine the conclusion that *United States Shoe* controls this case. As explained below, the Uniformity Clause at issue here utilizes the same terminology as the Export Clause at issue in *United States Shoe*, unlike the constitutional provisions addressed in the three precedents that *United States Shoe* distinguished.

2. The Terms "Tax" and "Duty" Have the Same Meaning in Different Provisions of Article I

The ruling in *United States Shoe* applies to this case, because the terms "tax and "duty" (which the Court interpreted in *United States Shoe*) have the same meaning in the Export Clause as in the Uniformity Clause and related provisions of Article I.

Article I provides that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises." U.S. CONST. art. I, § 8, cl. 1. Under this provision, the Court has held that there are only two categories of assessments embraced by the term "tax": direct taxes and indirect taxes. *See, e.g., Steward Mach. Co. v. Davis*, 301 U.S. 548, 581-82 (1937). Direct taxes – which are those "taxes" that are not "duties, imposts and excises" – are assessed directly upon people (*i.e.*, capitation taxes) or upon property ownership without regard to its use or disposition. *See* U.S. CONST. art. I, § 9, cl. 4; *Fernandez v. Weiner,* 326 U.S. 340, 361-62 (1945). By contrast, indirect taxes are "duties, imposts and excises," all of which are assessments imposed on the use or disposition of property. *Steward Mach. Co.*, 301 U.S. at 581-82; *Fernandez,* 326 U.S. at 361-62. Relying on historical evidence from 1787, when Article I was drafted, the Court has indicated that the term "duty" is the broadest of the three terms, encompassing both "impost" (which equates to modern day customs duties) and "excise." *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 290-91 (1976). Taken

together, the terms "duty," "impost" and "excise" cover every type of indirect tax. *Steward Mach. Co.*, 301 U.S. at 581-82; *see also Ptasynski*, 462 U.S. at 80.

This Court's decision in *United States Shoe* indicates that the HMT on exports was a "duty" or other indirect "tax" within the meaning of Article I. The Court held that the HMT was a "tax" or "duty" within the meaning of Article I's Export Clause. *United States Shoe*, 523 U.S. at 362, 370. The Court's analysis indicates that the particular species of "tax" at issue was an indirect tax, incurred because of the use or disposition of property. That is because the HMT was assessed on the loading of cargo for export transit. *See id.* at 364 & n.1.[3]

By contrast, the court of appeals' ruling necessarily rests on the premise that the HMT is neither a "duty" nor any other indirect "tax." Under the court of appeals' ruling, the HMT could not have been a "duty," because the Uniformity Clause applies to "*all* duties, imposts and excises." U.S. CONST. art. I, § 8, cl. 1 (emphasis added). The HMT also could not have been an indirect "tax" under the court of appeals' ruling, because this Court has interpreted the Uniformity Clause to apply to all indirect "taxes" that Article I grants Congress the power to enact. *Ptasynski*, 462 U.S. at 80-81 & n.9; *Steward Mach. Co.*, 301 U.S. at 581-82. The term "tax" does not appear in the Uniformity Clause. However, in Article I, the Uniformity Clause immediately

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[3] The HMT also bore no *indicia* of a direct tax, because it was not a capitation tax or a tax assessed purely as a result of property ownership. In addition, if the HMT had been a direct tax, it would have been subject to the provision of Article I requiring direct taxes to be laid "in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST. art. I, § 9, cl. 4; *see also Ptasynski*, 462 U.S. at 80 n.9. The HMT obviously did not satisfy this requirement, and the Court did not suggest that it should.

follows, and qualifies, the "Power To lay and collect Taxes, Duties, Imposts and Excises," providing that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1. The Court has long held that the "duties, imposts and excises" governed by the Uniformity Clause are a subset of the "taxes" that Congress has the power to enact under Article I. *See, e.g.*, *Ptasynski*, 462 U.S. at 80 ("The Uniformity Clause conditions Congress' power to impose indirect taxes."); *Fairbank v. United States*, 181 U.S. 283, 296 (1901).

1. The only way to distinguish *United States Shoe* from the present case, as the court of appeals attempted to do, is to conclude that the terms "duty" and indirect "tax" have different meanings under the Export Clause than under the Uniformity Clause and related provisions of Article I. Such a conclusion does not square with this Court's precedents. The Court has often ruled that a term that appears more than once in the Constitution's text has the same meaning each time it appears, particularly where, as here, the different provisions containing the term were ratified contemporaneously. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) ("the people" has the same meaning in the Fourth Amendment as in the First, Second, Ninth and Tenth Amendments); *cf. Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) ("When two parts of a provision (the Eighth Amendment) use different language to address the same or similar subject matter, a difference in meaning is assumed.") (Scalia, J., concurring). The Court has consistently applied that interpretive principle when construing the terms "tax," "duty," "impost," and "excise" under Article I.

For example, the Court has held that the "duties, imposts and excises" that Congress has the power to "lay and collect" under Article I, section 8 are the same "duties, imposts and excises" referred to in the Uniformity Clause. *Steward*

Mach. Co., 301 U.S. at 581-82; *Knowlton v. Moore,* 178 U.S. 41, 87-88 (1900). The Court also has concluded that the Export Clause limits the same "taxes" and "duties" that Congress has the Article I power to "lay and collect," by providing that a "tax" or "duty" cannot be "laid" on exported articles. *Fairbank,* 181 U.S. at 289-90, 295-96. The Court similarly has interpreted the term "duty" consistently under the Export Clause and the Import-Export Clause of Article I (*United States v. IBM Corp.* 517 U.S. 843, 857 (1996)) and has construed "imposts" and "duties" the same way under the Import-Export Clause and Article I, section 8, which grants Congress the power to assess "imposts" and "duties." *Michelin Tire Corp.*, 423 U.S. at 290-93.

As interpreted by this Court, therefore, the provisions of Article I governing taxation are well integrated with one another, establishing a coherent regime in which the same terms share a common meaning. These precedents demonstrate that *United States Shoe* is not distinguishable from this case, because an indirect "tax" or "duty" means the same thing under the Export Clause as under the Uniformity Clause.

2. The conclusion that the Export Clause and Uniformity Clause must be interpreted consistently draws additional support from their common function and history. Both clauses impose express limitations on the power to "lay and collect" taxes conferred by section 8 of Article I. *United States Shoe,* 523 U.S. at 368 (Export Clause limits the taxing power); *Ptasynski,* 462 U.S. at 80 (Uniformity Clause limits the taxing power); *Fairbank*, 181 U.S. at 295-96 (Export Clause and Uniformity Clause are two of the three express limitations on the taxing power). Because both clauses limit the power to tax, both were proposed, during the Constitutional Convention, as measures that would immediately follow the delineation of that power in the text of Article I; the Uniformity Clause ultimately retained that

position in the final version of the Constitution, whereas the Export Clause was placed in a different section of Article I, even though it remains a restriction on the taxing power. *See* U.S. CONST. art. I, § 8, cl. 1; James Madison Notes (Aug. 16, 1787) *in* 3 *THE FOUNDERS' CONSTITUTION* 366-67 (Philip B. Kurland & Ralph Lerner eds., 1987).

In addition, the Founders adopted both clauses to serve the same general purpose: preventing some states from imposing unfair exactions on other states. The Export Clause was proposed by Southern delegates to the Federal Convention, who "feared that the Northern States would control Congress and would use taxes and duties on exports to raise a disproportionate share of federal revenues from the South." *IBM Corp.*, 517 U.S. at 859 (citing 2 M. Farrand, *The Records of the Federal Convention of 1787* (rev. ed. 1966)). The Uniformity Clause also was adopted to prohibit the national government from imposing taxes that favored some states and disadvantaged others, which could create "'the grossest and most oppressive inequalities'" and permit the "'agriculture, commerce, or manufactures of one State [to] be built up on the ruins of those of another.'" *Ptasynski*, 462 U.S. at 81 (quoting 1 J. Story, *Commentaries on the Constitution of the United States* § 957 (T. Cooley ed. 1873)). The common function and history of the Uniformity Clause and the Export Clause further underscore that the court of appeals' decision that the HMT is a user fee and not a tax conflicts with this Court's decision, in *United States Shoe,* that the HMT is a tax and not a user fee.

If applied in other cases, the premise underlying the court of appeals' ruling – that the same terms have different meanings in different provisions of Article I – would undermine the coherent and integrated taxation regime that the Founders designed. The possibility arises, for example, that under Article I section 8, the Congress would have the power to enact some "duties, imposts and excises" that are

subject to the Uniformity Clause and others that are not. The Congress also might have the power to imposes "taxes" or "duties" that are not subject to the Export Clause at all, or "duties" that are governed by the Export Clause but not by the Uniformity Clause. The Court should review this case to address these far-reaching consequences for the integrity of the constitutional scheme.

C. The Court Should Grant Review to Prevent the Court of Appeals' Decision From Creating a Broad and Disruptive Impact on Federal Taxation

The court of appeals' conclusion that the same assessment can be simultaneously both a "tax" and a "user fee" has enormously broad and negative practical implications for the taxation regime established under Article I. This Court should grant review to prevent the court of appeals' flawed conclusion from standing as the law of the land for the customs taxes subject to the Federal Circuit's exclusive nationwide jurisdiction.

1. The Federal Budget Process Would Be Substantially Disrupted if Taxes Could be Characterized as User Fees

The federal budget process would be substantially disrupted if taxes could be characterized legitimately as user fees. The question whether an assessment is a tax or a user fee fundamentally affects the significant and politically charged questions whether Congress has raised taxes, and whether the federal budget is in balance, in deficit, or in surplus. The Congress has excluded user fees from the budget deficit calculus. *See* Congressional Budget Office, Congress of the United States, *The Growth of Federal User Charges* 19, 31-32 (1993). If taxes could be characterized freely as user fees, there would be an obvious tendency for budget deficit accounting to be skewed, as the Congress increasingly raised money through assessments called "user

fees" instead of "tax increases."

The legislative history of the HMT illustrates the congressional practice of omitting user fees from the deficit calculus. When various proposals for the HMT were under consideration in 1985, the Chairman of the House Budget Committee indicated that the HMT would not affect the budget deficit if structured so that there was a direct relationship between the exaction and the government services provided (*i.e.*, as a user fee). In particular, the Chairman indicated that there would be no budget deficit effect if the HMT were assessed based upon the volume or weight of cargo (rather than its value), because there would be a direct relationship between higher assessments imposed on shipments of large and bulky cargos and the greater harbor services that shipment of such cargos required. 131 Cong. Rec. H9737 (daily ed. Nov. 6, 1985) (letter from Hon. William H. Gray III, Chairman, House Budget Comm. to Hon. Walter B. Jones, Chairman, Comm. on Merchant Marine & Fisheries).

By contrast, the Budget Committee Chairman stated that there would be an effect on the budget deficit if the HMT were structured so that there was no direct connection between the charge and the harbor services provided (*i.e.*, as a tax). In particular, the Chairman indicated that an assessment based upon the value of cargo would so affect the deficit. The premise of the Chairman's analysis (wholly consistent with this Court's later analysis in *United States Shoe*) was that there would be "little relationship" between an *ad valorem* assessment and the harbor maintenance services it funded:

> A very valuable cargo, diamonds for example, would be taxed at a higher rate than a less valuable cargo which might weigh substantially more. This would be the result even though the less valuable cargo may require larger port facilities, deeper harbors, etc.

Id. As a result, the *ad valorem* assessment would be "more like a tax imposed by the United States pursuant to its revenue raising power." *Id.*

The Congress ultimately enacted the *ad valorem* version of the HMT, of course, and therefore included the HMT in the deficit calculus. *See The Growth of Federal User Charges* 22, 31-32 (HMT is a benefit-based tax, which is "revenue" for budget purposes). However, the court of appeals' analysis obviously would have provided the Congress with a strong rationale for converting the HMT from a "tax" to a "user fee." If Congress had done so, the effect of the HMT on the budget deficit would have been obscured from public view, and the deficit accounting would have been materially affected; currently the HMT accounts for approximately $500 million each year in taxes. *See, e.g.,* U.S. Army Corps of Engineers, IWR-Report 00-R07, *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1999* 13 (2001).

Furthermore, the potential effect of the court of appeals' analysis extends well beyond the specific budgetary impact of the HMT. There already is a well-developed trend for Congress to structure charges as user fees instead of taxes. The Congressional Budget Office has indicated that deficit reduction legislation in the 1980's and 1990's encouraged the Congress and federal agencies to add user fees "both to reduce recorded agency expenditures and to make it possible for programs to expand without increasing net outlays or raising taxes." *The Growth of Federal User Charges* 19. Indeed, in 2000, the Office of Management and Budget acknowledged an Administration policy "to shift to user fee funding wherever appropriate." Office of Management & Budget, The Executive Office of the President, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2001* 94 (2000). The result of these dynamics has been a great proliferation of user fees in recent years.

See The Growth of Federal User Charges 19; United States General Accounting Office, Federal User Fees: Budgetary Treatment, Status, and Emerging Management Issues 1, 7-9 (1997). The Office of Management and Budget recently reported that user fees will contribute more than $173 billion to federal government programs in fiscal year 2004. Office of Management & Budget, The Executive Office of the President, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2004* 89 (2003).

If the Congress and the Executive Branch could freely characterize taxes as user fees, as the court of appeals did, they would have every reason to do so, and the pernicious effect on the accounting for the federal budget deficit would be enormous. This Court should grant this petition to review the significant question whether the same assessment may be both a tax and a user fee.

2. The Legislative Process Would be Disrupted if the Same Assessment Could be Characterized Both as a Tax and a User Fee

The legislative process governing taxation also would be substantially affected if the same assessment could be characterized both as a tax and a user fee. That process depends fundamentally upon determinations that particular assessments are *either* taxes *or* user fees. If the court of appeals were correct, and the same measure could be both a tax and a user fee at the same time, the legislative process would be disrupted. The Court should grant review because of this important collateral implication of the court of appeals' decision.

The question whether an assessment is a tax or a user fee fundamentally affects whether Congress may delegate, to an administrative agency, the power to impose the assessment. While Congress has the power to impose both taxes and user

fees, it may not constitutionally delegate its power to tax but may permit the agencies to impose user fees under statutory authorization. *See Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974). Therefore the characterization of an assessment as either a tax or a user fee is vitally important to determine whether delegation is permissible. If the same assessment could be both a tax and a user fee, as the court of appeals held, this critical determination would be fraught with difficulty, undermining the Congress's ability to evaluate its own constitutional limits. This Court accordingly should review the court of appeals' ruling that an assessment can be both a tax and a user fee at the same time.

The question whether an assessment is a tax or a user fee also could affect which house of Congress may originate the measure. The Origination Clause of Article I requires that "All Bills for raising Revenue shall originate in the House of Representatives." U.S. CONST. art. I, § 7, cl. 1. The Origination Clause only governs bills that "levy taxes, in the strict sense of the word," and "bills for other purposes which may incidentally create revenue" need not originate in the House. *Twin City Nat'l Bank of New Brighton v. Nebecker*, 167 U.S. 196, 202 (1897) (citing 1 J. Story, *Commentaries on the Constitution* § 880, p. 610-611 (3d ed. 1858)); *see also United States v. Munoz-Flores*, 495 U.S. 385, 397 (1990). The characterization of an assessment as a tax or user fee is integrally related to whether it is imposed by a "statute that raises revenue to support the Government generally," which must originate in the House. *Munoz-Flores*, 495 U.S. at 397-98. Because a particular revenue measure either is, or is not, required to originate within the House, this Court should review the court of appeals' ruling that an assessment can be both a tax and a user fee at the same time.

Finally, the question whether an assessment is a tax or a

user fee fundamentally affects which Committee of the House of Representatives has jurisdiction to consider it, because the Ways and Means Committee has exclusive jurisdiction over taxes, whereas other standing Committees (as well as Ways and Means) may report out measures raising user fees. *See The Growth of Federal User Charges* 23. The legislative history of the HMT reflects this jurisdictional issue within the House. The House Budget Committee Chairman indicated that the HMT would be outside the jurisdiction of the House Merchant Marine and Fisheries Committee if it were assessed on an *ad valorem* basis (because it would be a tax) but within the jurisdiction of that Committee if it were assessed on the weight or volume of cargo (because it would be a user fee). 131 Cong. Rec. H9737 (daily ed. Nov. 6, 1985). Because the House Ways and Means Committee either does, or does not, have exclusive jurisdiction over a particular revenue measure, this Court should review the court of appeals' ruling that an assessment can be both a tax and a user fee at the same time.

D. The Court's Review Should Address the Substantive Scope of the Uniformity Clause

If the Court grants the petition to resolve the conflict with *United States Shoe* on the tax/user fee question, the Court's review also should address the substantive scope of the Uniformity Clause. The court of appeals did not delineate the substantive scope of the Uniformity Clause, because it held that the Clause did not govern the HMT. However, the CIT did address the issue, proffering an interpretation of the Uniformity Clause that does not square with this Court's precedents. Although this Court does not typically review an issue decided by the trial court but not by the court of appeals, it should do so here, because the CIT's Uniformity Clause decision has a binding effect nationwide; that broad effect stems from the CIT's unique role in the federal

judiciary, as the trial court with exclusive jurisdiction over cases involving customs duties. *See* 28 U.S.C. § 1581. Because of that exclusive jurisdiction, Congress has established the CIT nationally as the frontline judicial guardian of the Uniformity Clause as it applies to customs duties. The Chief Judge of the CIT explained this significant responsibility when that court was created in 1980:

> These additions to the court's jurisdiction, particularly, 28 U.S.C. § 1581(i), the residual jurisdiction provision, were designed to implement the constitutional mandate that 'all Duties, Imposts and Excises shall be uniform throughout the United States.'

19 U.S.C.A. §§ 1-1550, at xxx (West 1999).

In this case, review of the CIT's nationally binding ruling is warranted, because that court materially altered the scope of the Uniformity Clause as construed in this Court's precedents. This Court has long held that the Uniformity Clause requires taxes to be "geographically" uniform. *See, e.g., Knowlton v. Moore,* 178 U.S. 41, 106 (1900). Geographic uniformity means that a tax "operates with the same force and effect in every place where the subject of it is found." *Edye v. Robertson*, 112 U.S. 580, 594 (1884); *see also Knowlton,* 178 U.S. at 106. Thus, if "a subject is taxed anywhere, the same [subject] must be taxed everywhere throughout the United States, and at the same rate." *Knowlton*, 178 U.S. at 84. The Court's most recent examination of the Uniformity Clause reaffirms that once Congress has defined the class to be taxed, the tax must "apply wherever the classification is found." *Ptasynski*, 462 U.S. at 82.

Notwithstanding these precedents, the CIT held that Congress *does* have the power to tax the same subject differently in different geographic areas, as long as it has a good reason for doing so. The CIT incorporated by reference its decision in *Thomson*, in which it held that a tax

violates the Uniformity Clause "only where [the Court] finds that Congress' purpose was to promote regional favoritism or discrimination" (219 F. Supp. 2d at 1326) and also indicated that a tax does not violate the Uniformity Clause unless Congress has acted in "bad faith" (*id.* at 1328), rather than for a "benign" purpose (*id.* at 1329).

In the present case, the CIT concluded that the HMT's benign purpose rendered it constitutional, regardless of whether the same subject was taxed the same way in all geographic areas where it exists. In particular, the CIT ruled that the Uniformity Clause did not prohibit the tax exemption for Alaskan and Hawaiian ports, even though the subject of the tax – "port use" defined as cargo unloadings – was taxed differently in Alaska and Hawaii than in the other coastal states. The CIT concluded that the HMT was constitutional, because Congress enacted the exemption for the purpose of alleviating the disproportionate impact of the tax in the two states most dependent upon ocean shipping. (Pet. App. A21-23.)

If the CIT were correct, Congress could freely tax the same subject differently in different regions of the country as long as it had a good reason for doing so, and the Uniformity Clause would be rendered a nullity. Under the CIT's decision, the Congress could, for example, impose different customs duty rates in different ports for the same merchandise, as long as the congressional purpose was to address local economic conditions. Because of the CIT's exclusive jurisdiction, its decision now states the governing constitutional standard for customs duties throughout the nation. If the Court grants review of the Uniformity Clause issues in this case, that review should extend to the substantive scope of the Uniformity Clause, so that this Court may directly address the CIT's contention that Congress may enact a tax that treats the same subject differently in different geographic areas.

II. THE COURT SHOULD GRANT THE PETITION TO ADDRESS THE QUESTION WHETHER THE PORT PREFERENCE CLAUSE REMAINS A MEANINGFUL LIMIT ON CONGRESSIONAL POWER

The Court also should grant the petition to address the significant question whether the Port Preference Clause retains continuing vitality as a meaningful limit on congressional power. The court of appeals announced a new test under the Clause that would eviscerate its protections, consistent with the government's view that the Port Preference Clause is "essentially a dead letter." (Pet. App. A38.) The Court should review this case to clarify the requirements of the Port Preference clause.

The Port Preference Clause provides that "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. CONST. art. I, § 9, cl. 6. This Court has identified two tests for an unconstitutional port preference. *First*, the preference must be a "direct" preference expressly conferred by the statute at issue; the Clause does not prohibit mere "incidental advantages" to ports stemming from facially neutral statutes. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 435 (1855); *Armour Packing Co. v. United States*, 209 U.S. 56, 80 (1908); *see also Ala. Great S. Ry. Co. v. United States*, 340 U.S. 216, 229 (1951) (Port Preference Clause not violated because "whatever preference there is to New Orleans is the result of geography and not of any action of the [Interstate Commerce] Commission"). *Second*, to violate the Port Preference Clause, a preference must be drawn along state lines. "[W]hat is forbidden is, not discrimination between individual ports within the same or different States, but discrimination *between* States. . . ." *Wheeling*, 59 U.S. at 435 (emphasis added); *La. Pub. Serv. Comm'n v. Tex. & New Orleans R.R.*, 284 U.S. 125, 131 (1931).

However, under the court of appeals' analysis, the exemption for Alaska and Hawaii was constitutional, even though it met the two tests previously established by this Court. The HMT statute does contain an express tax exemption for the ports of Alaska and Hawaii, and the statute treats all of the ports of Alaska and Hawaii more favorably than all of the ports of the other coastal states. The court of appeals reached its decision by adding a newly minted third test for an unconstitutional port preference: it must involve "deliberate discrimination against the ports in one or more states and in favor of others." (Pet. App. A15.)

In one sense, of course, "deliberate discrimination" occurs every time Congress makes an express distinction in a statute, for purposes no one could doubt are proper. *Cf. Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (state statute may "discriminate" against interstate commerce even if the statute "serves a legitimate local purpose"). But what the court of appeals meant by "deliberate discrimination" carries a more sinister connotation. The court of appeals concluded that to be unconstitutional, a port preference must derive from favoritism for one state over another, intended to channel commerce to certain states simply because they are more favored than others. (Pet. App. A19.) In the court of appeals' view, the HMT statute did not meet this test, because the exemption for Alaska and Hawaii was not intended to "favor" those states and was instead enacted for the purpose of alleviating the HMT's disproportionate impact in those states, arising from their high dependency upon ocean-going cargo. (*See id.*)

The effect of this third test was to gut the protections of the Port Preference Clause. It would be rare indeed for Congress to leave evidence that it distinguished between states for the nefarious purpose of "favoring" some states at the expense of others. The government admitted as much in the CIT, when if proffered the third test to the court in the

related *Thomson* case:

> THE COURT: Well, how is Congress going to show intentional discrimination, other than saying, We favor Hawaii and Alaska?
>
> [GOVERNMENT COUNSEL]: Well, that's exactly the point, Your Honor. That's why this clause has never been used to strike down a – a statute or a regulation. *It's essentially a dead letter.*

(Pet. App. A38 (emphasis added).)

This Court should grant the petition to delineate the scope of the protections provided by the Port Preference Clause. If left unreviewed, the court of appeals' decision would have a long and lasting impact on the revenue laws affecting the nation's ports. The Federal Circuit has exclusive jurisdiction at the court of appeals level to review such laws, and therefore Supreme Court review is the only mechanism for alleviating the impact of the constitutional ruling here presented. *See* 28 U.S.C. § 1295(a)(5) (granting Federal Circuit exclusive jurisdiction to review CIT decisions); *id.* § 1581 (granting CIT exclusive jurisdiction to review customs revenue laws). This Court has previously granted certiorari because it was the only avenue for relief on significant issues within the Federal Circuit's exclusive jurisdiction. And the Court should do so here. The court of appeals acknowledged that it found no precedent in this Court's decisions (or in the decisions of any other court) for its new third test under the Port Preference Clause. (Pet. App. 16-17.) This Court should exercise its discretion to make its views known on such a significant question, which controls whether a provision of the Constitution does, or does not, impose meaningful restrictions on congressional power.

Furthermore, the Court should grant the petition because of the broad impact it would have on the many thousands of

shippers who pay the HMT. Although the court of appeals concluded that the purpose behind the Alaska and Hawaii exemption was legitimate, the exemption's effect is extraordinarily unfair to shippers such as CF Industries. For example, under the portion of the exemption applicable to shipments from the "lower 48" states, shippers such as CF Industries (which unloads cargo in Louisiana that was shipped from Florida) pay the tax, whereas shippers that unload identical cargo in Alaska or Hawaii that also was shipped from the "lower 48" pay no tax. 26 U.S.C. §§ 4462(b)(1)(A), (C). Accordingly, CF Industries paid more than $50,000 in HMT last year, based on unloadings of fertilizer valued at $46 million, while others who ship fertilizer of exactly the same value pay nothing when they unload in Alaska and Hawaii.[4] The Court should review the court of appeals' decision to provide a remedy for this manifestly unequal treatment.

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[4] In the year 2000 alone, no HMT was required on approximately 33,000 tons of nitrogen and phosphate fertilizer shipped from the mainland and unloaded in Hawaii. *See Worldwide NPK Capacity Listing by Plant*, FERTILIZER SITUATION REP. (Int'l Fertilizer Dev. Ctr., Muscle Shoals, Ala.), Aug. 2000; D.L. Terry & Bill J. Kirby, *Commercial Fertilizers 2001* (Ass'n of Am. Plant Food Control Officials, Inc., Lexington, Ky. & Fertilizer Institute, Washington D.C), June 2002; *Piers U.S. Import Information*, J. COM. (Port Imp. Exp. Reporting Serv., Newark, NJ), Oct. 2002.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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